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Dr Aishah Tul Radziah bt L Hussin v Dr Suresh a/l Kumarasamy & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 21NCVC-24–05 OF 2012
S NANTHA BALAN JC
21 MARCH 2014

Civil Procedure — Res judicata — Issue estoppel — Sessions court in first suit held plaintiff wholly liable for medical negligence to patient and absolved defendants of negligence — Defendants not parties or privies to first suit but only testified for patient during trial — Subsequent action by plaintiff to seek contribution/indemnity from defendants — Whether defendants could invoke res judicata/issue estoppel to strike out plaintiff's action — Whether fact defendants not parties to first suit immaterial as issue of negligence determined finally as between plaintiff and defendants — Whether plaintiff's action abuse of process

Was an issue that had been determined as between the parties herein by the sessions court in a previous suit ('the first suit') res judicata as between them even though the defendants were not parties or privies to the first suit? The defendants herein contended that the answer to that question was yes and that they were entitled to raise the plea of res judicata/issue estoppel in the instant suit to preclude the plaintiff from relitigating that issue. In the first suit, a patient ('Zalina') of the plaintiff ('Dr Aishah') had sued the latter for medical negligence for failing to remove the placenta after Zalina had delivered her first child at Dr Aishah's clinic. The day after the delivery, Zalina fell ill and she was eventually admitted to the Hospital Pulau Pinang ('HPP') where ultrasound investigation by the third defendant ('D3') found she had an unremoved placenta. The second defendant ('D2') performed a dilatation and curettage ('D&C') to remove the placenta but following the procedure Zalina started bleeding profusely necessitating an emergency hysterectomy which was done by the first defendant ('D1'). The first four defendants herein were all government servants at the time serving at HPP. The fourth defendant's role in the case was unclear from Dr Aishah's pleadings. In the first suit, Dr Aishah denied negligence on her part, asserting that Zalina did not have a case of 'retained placenta', and blamed the first to the fourth defendants herein for negligently finding that she had that problem and then negligently performing the D&C procedure necessitating the hysterectomy. Despite her contentions, Dr Aishah did not add HPP or any of the defendants as parties to the first suit. D1, D2 and D3, however, testified for Zalina at the trial of the first suit and defended themselves against allegations that they were negligent in their treatment of her. Finding as a fact that Zalina did suffer from a retained placenta, the sessions court found Dr Aishah wholly liable and absolved the

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doctors at HPP of any negligence. The sessions court's decision was upheld on appeal by the High Court and Dr Aishah did not appeal the matter further. In the instant suit, Dr Aishah sought contribution and/or indemnity from the defendants premised on the decision in the first suit and further contended that HPP and its doctors gave false evidence and suppressed material facts during the trial of the first suit causing the decision to go against her. The defendants applied under O 18 r 19 of the Rules of Court 2012 to strike out Dr Aishah's instant action on the ground her claim was not only time barred under the Public Authorities Protection Act 1948 ('the PAPA') but was an abuse of process for seeking to relitigate the issue of negligence already determined in the first suit. Dr Aishah argued that her suit was neither time barred under the PAPA nor an abuse of process as the allegations of fraud and perjury against the defendants should be allowed to be ventilated and determined. She also contended that the defendants were not entitled to raise the plea of res judicata/issue estoppel as they were not parties or privies to the first suit but only participated therein as witnesses.

Held, allowing the application, striking out the writ and statement of claim:

(1) Nothwithstanding the fact HPP and its doctors were neither parties nor privies to the first suit, the facts and circumstances were such that they had participated in that suit as witnesses and a ruling on the issue of liability was made in their favour. As such, a fresh suit against them based on essentially the same issue was an abuse of process and the plea of res judicata/issue estoppel succeeded. There had to be finality to the litigation. It was unjust and oppressive to allow Dr Aishah to drag HPP and its doctors through another round of litigation to re-litigate the same issue (see paras 77–78).

(2) As a matter of fairness, fair-play and justice, since Dr Aishah shifted the blame to HPP and its doctors in the first suit, she should have joined them either as third parties or as co-defendants in that suit and made all necessary interlocutory applications by way of further and better particulars or discovery or interrogatories. Everything that was articulated against HPP and its doctors in the present suit could have been done in the first suit (see para 76).

(3) It could not be said that merely because the defendants were not parties to the first suit they should be denied the right to raise the plea of res judicata. Certain compelling circumstances — the present case being an example — might warrant a departure from the requirement for privity of interest where to insist on it would be unfair or oppressive or even an abuse of process. In the first suit, HPP and its doctors were in pith and substance 'on trial' on the issue of their alleged negligence in the diagnosis, treatment and management of Zalina. Since the finding on

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that issue was in favour of HPP and its doctors, that issue was barred by issue estoppel from being resurrected in the present suit (see paras 71–72).

(4) The defendants' reliance on limitation under the Public Authorities Protection Act 1948 was not tenable as time in respect of Dr Aishah's claim for indemnity and/or contribution only ran from the date she was found liable to Zalina by the sessions court. That fact, however, did not defeat the plea of res judicata taken by the defendants (see paras 33, 36 & 38).

[Bahasa Malaysia summary

Adalah suatu isu yang telah ditentukan antara pihak-pihak di sini oleh mahkamah sesyen dalam guaman sebelum ini ('guaman pertama') res judicata antara mereka meskipun defendan-defendan bukan pihak-pihak atau privi-privi kepada guaman pertama? Defendan-defendan di sini berhujah bahawa jawapan kepada persoalan itu adalah ya dan bahawa mereka berhak menimbulkan pli res judicata/isu estopel dalam guaman ini untuk menghalang plaintif daripada membicarakan semula isu tersebut. Dalam guaman pertama, pesakit ('Zalina') plaintif ('Dr Aishah') telah menyaman Dr Aishah untuk kecuaian perubatan kerana gagal mengeluarkan uri selepas Zalina melahirkan anak pertamanya di klinik Dr Aishah. Sehari selepas melahirkan anak itu, Zalina jatuh sakit dan dia akhirnya telah dimasukkan ke Hospital Pulau Pinang ('HPP') di mana penyelidikan gelombang bunyi ultra oleh defendan ketiga ('D3') mendapati dia mempunyai uri yang tidak dikeluarkan. Defendan kedua ('D2') telah melalakukan dilatasi dan pengkuretan ('D&C') untuk mengeluarkan uri itu tetapi berikutan prosedur itu Zalina mula mengalami pendarahan yang banyak sehingga histerektomi kecemasan perlu dilakukan oleh defendan pertama ('D1'). Keempat-empat defendan pertama di sini kesemuanya adalah kakitangan kerajaan pada masa berkhidmat di HPP. Peranan defendan keempat dalam kes ini adalah tidak jelas berdasarkan pliding Dr Aishah. Dalam guaman pertama, Dr Aishah menafikan kecuaian di pihaknya, dengan menegaskan bahawa Zalina tidak mempunyai kes 'retained placenta', dan menyalahkan defendan-defendan pertama hingga keempat di sini kerana dengan cuai mendapati bahawa dia mempunyai masalah tersebut dan kemudian dengan cuai melakukan prosedur D&C sehingga histerektomi diperlukan. Walaupun terdapat hujahannya, Dr Aishah tidak memasukkan HPP atau mana-mana defendan itu sebagai pihak-pihak dalam guaman pertama. D1, D2 dan D3, bagaimanapun, memberi keterangan untuk Zalina semasa perbicaraan guaman pertama dan membela diri mereka terhadap dakwaan-dakwaan bahawa mereka telah cuai dalam rawatan mereka terhadapnya. Dengan membuat penemuan fakta bahawa Zalina sememangnya mengalami uri yang tidak dikeluarkan, mahkamah sesyen mendapati Dr Aishah bertanggungjawab secara keseluruhannya dan membebaskan doktor-doktor di HPP daripada apa-apa kecuaian. Keputusan mahkamah

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sesyen telah dikekalkan atas rayuan oleh Mahkamah Tinggi dan Dr Aishah tidak merayu perkara itu selanjutnya. Dalam guaman ini, Dr Aishah memohon sumbangan dan/atau ganti rugi daripada defendan-defendan berdasarkan keputusan dalam guaman pertama dan selanjutnya menegaskan bahawa HPP dan doktor-doktornya telah memberikan keterangan palsu dan menyembunyikan fakta penting semasa perbicaraan guaman pertama sehingga menyebabkan keputusan tidak menyebelahinya. Defendan-defendan memohon di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 untuk membatalkan tindakan Dr Aishah ini atas alasan tuntutannya bukan sahaja di luar had masa di bawah Akta Perlindungan Pihak-Pihak Berkuasa Awam 1948 ('APPPBK') tetapi adalah penyalahgunaan proses untuk memohon perbicaraan semula isu kecuaian yang telah pun ditentukan dalam guaman pertama. Dr Aishah berhujah bahawa guamannya tidak luput had masa di bawah APPPBK dan bukan suatu penyalahgunaan proses kerana dakwaan-dakwaan penipuan dan sumpah palsu terhadap defendan-defendan patut dibenarkan untuk dibicarakan dan ditentukan. Dia juga berhujah bahawa defendan-defendan tidak berhak menimbulkan pli res judicata/isu estopel kerana mereka bukan pihak-pihak atau privi-privi kepada guaman pertama tetapi hanya terlibat sebagai saksi-saksi.

Diputuskan, membenarkan permohonan, membatalkan writ dan pernyataan tuntutan:

(1) Walaupun kenyataan bahawa HPP dan doktor-doktornya bukan pihak-pihak atau privi-privi kepada guaman pertama, fakta dan keadaan sedemikian sehinggakan mereka telah terlibat dalam guaman tersebut sebagai saksi-saksi dan satu keputusan berhubung isu liabiliti telah dibuat menyebelahi pihak mereka. Oleh itu, guaman baru terhadap mereka berdasarkan pada asasnya isu yang sama adalah penyalahgunaan proses dan pli res judicata/isu estopel berjaya. Perlu ada kemuktamadan tindakan undang-undang. Adalah tidak adil dan bersifat menindas untuk membenarkan Dr Aishah mengheret HPP dan doktor-doktornya melalui satu lagi pusingan litigasi untuk membuat litigasi semula berhubung isu yang sama (lihat perenggan 77–78).

(2) Demi keadilan, kesaksamaan dan kehakiman, oleh kerana Dr Aishah telah mengalih kebersalahan itu kepada HPP dan doktor-doktornya dalam guaman pertama, dia patut menggabungkan mereka sama ada sebagai pihak ketiga atau defendan-defendan bersama dalam guaman tersebut dan membuat semua permohonan interlokutori yang perlu melalui butiran atau penemuan atau soal siasat lanjut yang lebih. Semua yang dinyatakan terhadap HPP dan doktor-doktornya dalam guaman ini boleh dilakukan dalam guaman pertama (lihat perenggan 76).

(3) Tidak boleh dikatakan hanya kerana defendan-defendan bukan pihak-pihak kepada guaman pertama maka mereka patut dinafikan hak

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untuk menimbulkan pli res judicata. Beberapa keadaan tertentu yang menarik — sebagai contoh kes ini — mungkin mewajarkan penyimpangan daripada keperluan untuk priviti kepentingan yang mana untuk berkeras untuknya adalah tidak adil atau bersifat menindas atau suatu penyalahgunaan proses. Dalam guaman pertama, HPP dan doktor-doktornya 'on trial' berhubung isu dakwaan tentang kecuaian mereka dalam diagnosis, rawatan dan pengendalian Zalina. Oleh kerana penemuan berhubung isu tersebut menyebelahi HPP dan doktor-doktornya, isu tersebut dihalang oleh isu estopel daripada dibangkitkan semula dalam guaman ini (lihat perenggan 71–72).

(4) Kebergantungan defendan-defendan kepada had masa di bawah APPPPBK tidak dapat dipertahankan kerana masa berkenaan tuntutan Dr Aishah untuk ganti rugi dan/atau sumbangan hanya bermula dari tarikh dia didapati bertanggungjawab kepada Zalina oleh mahkamah sesyen. Fakta tersebut, bagaimanapun, tidak menyangkal pli res judicata yang diambil oleh defendan-defendan (lihat perenggan 33, 36 & 38).]

Notes

For cases on issue estoppel, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 7551–7574.

Cases referred to

Adenan bin Ismail v Naluri Corporation Bhd & Ors [2010] MLJU 494, HC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2) [1966] 2 All ER 536, HL (refd)

DVS Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar and thirteen other ships; The Sennar [1985] 2 All ER 104, HL (refd)

Dato' Abul Hassan bin Mohamed Rashid v Multi-Code Electronics Industries & Anor [2012] 5 MLJ 176, CA (not folld)

Gleeson v J Wippell & Co Ltd [1977] 3 All ER 54, Ch D (refd)

Haji Junus v Chik & Anor [1963] 1 MLJ 303 (refd)

Jak Kwang Builders & Developers Sdn Bhd v Ng Chee Keong & Ors [2001] 4 MLJ 391, HC (refd)

Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor [1999] 1 MLJ 193, FC (refd)

Malaysian National Insurance Sdn Bhd v Lim Tiok [1997] 2 MLJ 165, SC (refd)

Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor [2009] 2 MLJ 660, FC (refd)

Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226, SC (not folld)

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Nanang International Sdn Bhd v The China Press Bhd [1999] 2 MLJ 681, HC (refd)
North West Water Ltd v Binnie & Partners (a firm) [1990] 3 All ER 547, QBD (refd)
Reebok International Ltd v Royal Corporation [1989] 1 MLJ 209, HC (refd)
Sinarlim Sdn Bhd v Waja Destinasi (M) Sdn Bhd [2011] 5 MLJ 416; [2012] 3 CLJ 678, CA (refd)
Teguh Consolidated Sdn Bhd v Talam Corp Bhd (Malayan Banking Bhd, third party) [1996] 5 MLJ 664, HC (refd)
Wong Peng Yan Benjamin v Genting Bhd & Anor [1993] 3 MLJ 713, HC (refd)
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581, PC (refd)

Legislation referred to

Civil Law Act 1956 s 10(1)
Medical Act 1971
Public Authorities Protection Act 1948
Rules of Court 2012 O 18 r 19, O 18 r 19(1)(a), (b), (d)
Subordinate Courts Rules 1980 O 15, O 16

Manmohan Singh Dhillon (Khabir Dhillon) for the plaintiff.
Mohd Radhi Abas (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

S Nantha Balan JC:

BACKGROUND

[1] These are my grounds in respect of an application by the above named defendants (encl 12) to strike out the writ and statement of claim pursuant to O 18 r 19 of the Rules of Court 2012 ('the ROC').

[2] The plaintiff herein was the defendant in a previous action where she was sued by her former patientifor medical negligence. The patient was also treated or managed subsequently by the present defendants. The first, second and third defendants had testified on behalf of the patient in the first suit.

[3] In order to exonerate herself against the allegations of negligence made by her former patient, the present plaintiff shifted the blame to the defendants and maintained that it was they who were negligent in their diagnosis, treatement and management of the patient. Hence, the issue of negligence of the present plaintiff and that of the defendants (who appeared as witnesses) had to be dealt with by the court in the first suit.

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[4] The outcome of the first suit was that the present plaintiff was found to be negligent whereas the defendants were exonerated of any negligence. The plaintiff now seeks to revisit the issue of the defendants' alleged negligence. In response, the defendants have raised the plea of res judicata (issue estoppel) with respect to the issue of negligence which had been previously raised and which the court had ruled in their favour.

[5] The issue now is whether res judicata may be relied upon in a situation where the party raising the plea of res judicata was not a party to previous litigation but had participated in the previous litigation as a relevant witness and where they had faced an allegation of negligence in respect of which the court had ruled in their favour.

[6] Put in another way, the issue in the present case is whether the plaintiff, as the unsuccessful party in the previous litigation, is entitled to commence fresh litigation against a witness who was embroiled in the issue of liability and raise the same issue of liability which had already been determined in the previous litigation. Since the defendants were not parties to the previous litigation, the core question is whether res judicata can apply, where parties are not the same and/or where there is no privity of interest. The context in which the issue has arisen can be gleaned from the background to the present litigation which is discussed below.

THE FIRST SUIT

[7] The plaintiff ('Dr Aishah') is a registered medical practitioner and runs a maternity clinic in Sungai Petani, Kedah under the name and style of Klinik Wisma Bersalin Dr Aishah – Dr Fisol ('the clinic'). One Zalina bt Sabedin ('Zalina') was a patient of the clinic. On 8 June 1994 Zalina delivered her baby at the clinic.

[8] The delivery appeared to be uneventful and Zalina's baby was healthy in all respects. However, shortly after delivery Zalina developed fever. She sought treatment at the Butterworth Hospital ('BH') and was later transferred to Hospital Pulau Pinang ('HPP') for further treatment and management.

[9] Whilst at HPP, she was diagnosed as having retained placenta and it was initially decided that she should undergo a procedure known as dilatation and curettage ('the D&C'). She underwent the D&C but thereafter started bleeding profusely. This was apparently a life threatening event.

[10] Finally, the doctors at HPP decided that she should have an emergency hysterectomy. As such, on 17 June 1994 a hysterectomy was performed at HPP and Zalina's uterus was removed.

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[11] Zalina then sued Dr Aishah in the Sessions Court at Sungai Petani by way of Suit No 53–177 of 2000 ('the first suit'), claiming that she was negligent in the manner of performing the delivery and in particular, in failing to ensure that there was no retained placenta in her uterus after delivery of her baby.

[12] Hence, the issues in the first suit were whether Zalina did have retained placenta and whether Dr Aishah was liable for medical negligence. Also the court had to decide whether HPP and its doctors had misdiagnosed that there was retained placenta and/or were negligent in having carried out the D&C. Essentially, Dr Aishah denied that there was retained placenta and shifted the entire blame on HPP and its doctors.

[13] BH and HPP are both medical institutions which are owned and operated by the Government of Malaysia. The first to fourth defendants are or were at all material times employees of the Government of Malaysia and serving in their respective fields of medical practice or specialisation in HPP.

[14] The first defendant is an obstetrician and gynecologist who performed the hysterectomy. The second defendant is the medical officer who performed the D&C. The third defendant is the medical officer at HPP who did the ultrasound investigation and determined that there was retained placenta. The fourth defendant's role in relation to, inter alia, the hysterectomy procedure, is not clear from the statement of claim.

[15] In the present suit, Dr Aishah claims Zalina was negligently treated by the first to fourth defendants which led her to suffer massive bleeding which necessitated an emergency hysterectomy on 17 June 1994. Quite obviously this is not the first time that this issue is being ventilated as it was already an issue in the first suit.

[16] During the trial of the first suit, the first to third defendants gave evidence on behalf of Zalina. They were cross-examined by counsel for Dr Aishah. As stated earlier, the core issue in the first suit against Dr Aishah was whether she was responsible for Zalina having retained placenta. Dr Aishah in turn sought to shift the blame on HPP and the doctors who attended to Zalina. However, it should be noted rather significantly that Dr Aishah took no steps to include HPP and its doctors as third parties or as co-defendants to the first suit.

[17] Thus, although the first to third defendants were not parties to the first suit, they were nevertheless crucial witnesses. They testified on Zalina's behalf and defended themselves against the allegation of negligence that became the focus of Dr Aishah's attack during the trial of the first suit. They were cross-examined as to their diagnosis, treatment and management of Zalina. Put

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tersely, the competence and professionalism of HPP and its doctors was subjected to curial scrutiny by way of the first suit.

[18] In pith and substance, Dr Aishah had contended in the first suit, inter alia, that there was no retained placenta and that HPP and its doctors had misdiagnosed that there was retained placenta.

[19] There is no dispute that in the first suit, the sessions judge had to decide (as an issue that was placed before her), whether Dr Aishah or the doctors at HPP should be held liable for medical negligence vis-a-vis the diagnosis of retained placenta and the subsequent D&C procedure and hysterectomy that had to be carried out on Zalina.

[20] After having heard and seen the witnesses and upon conclusion of the full trial, the learned sessions judge held that Dr Aishah was liable for medical negligence and that HPP (and its doctors) were not negligent in the diagnosis, treatment and management of Zalina. On the issue of retained placenta, the sessions judge found as a fact that there was retained placenta, which eventually necessitated an emergency total abdominal hysterectomy ('hysterectomy').

[21] The learned sessions judge gave her written grounds of judgment to justify her decision. This was upheld by the High Court on an appeal lodged by Dr Aishah. Hence, albeit that HPP and its doctors were not parties to the first suit, it is clear that the issue of HPP's liability for negligence had been considered, deliberated upon, investigated, tested and conclusively determined by the sessions court in favour of HPP and its doctors.

[22] In short, the first suit concluded in favour of HPP and its doctors in that they were totally exonerated of all liability for negligence whereas Dr Aishah was found totally liable for medical negligence.

[23] The basis for the sessions judge's decision may be gleaned from her grounds of judgment (see exh SK3 annexed to the affidavit of Dr Suresh encl 12). Dr Aishah now says that HPP and its doctors had suppressed facts from the sessions court and misled that court, which resulted in that court reaching a decision adverse to Dr Aishah.

[24] Before reverting to the judgment of the sessions judge, I should mention that in the defence filed by Dr Aishah in the first suit, specific reference was made to the discrepancies between the results of the ultrasound scan by Dr Najeemu bt Hamzah ('the third defendant') and the histopathological reports by Dr Halimah Yahya (pathologist at HPP) (see paras 10–12 of the defence — exh SK2 annexed to the affidavit of Dr Suresh — encl 12). Of course, there was no specific plea in the defence by Dr Aishah

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attributing negligence to the doctors at HPP. But it was nevertheless an issue which became the focus of the trial in the first suit.

[25] As such, it is appropriate to say that the issue of negligence of the doctors at HPP, encompassing at least the professional conduct of the first to third defendants, who testified at the trial of the suit by Zalina, was a live issue and was at all material times extant and vigorously pursued in the first suit.

[26] The facts as found and conclusions made by the learned sessions judge (in the relevant pages of her grounds of judgment in exh SK3 encl 12) in relation to the histopathological reports by Dr Halimah Yahya and the ocular and ultrasound investigation leading to the conclusion that there was retained placenta and that there was no negligence on the part of the doctors at HPP, are as follows:

> Pada 8/6/1994 Plaintif telah dimasukkan ke klinik Defendan (Klinik Wisma Bersalin Dr. Aishah – Dr. Fisol) untuk melahirkan anak pertamanya. Defendan adalah seorang doktor yang beramal di klinik tersebut dan sebagai pemilik. Defendan telah memeriksa Plaintif pada 8/6/1994 untuk melahirkan anaknya dan telah melahirkan anak perempuan pada 8/6/1994 jam 1.54 pagi di klinik tersebut. Kelahiran anak tersebut dilakukan, diurus dan dikendalikan oleh Defendan. Pada 9/6/1994 jam 3.30 petang Plaintif telah keluar dari klinik, Plaintif telah mengalami kepucatan, hilang tenaga dan demam dan terus pergi ke klinik kesihatan ibu dan anak di Sungai Dua Pulau Pinang untuk pemeriksaan yang kemudian klinik tersebut telah merujuk Plaintif ke Hospital Butterworth pada 14/6/1994 dan dimasukkan ke wad pada 16/6/1994. Hospital Butterworth kemudian merujuk Plaintif ke Hospital Pulau Pinang. Hospital Pulau Pinang telah membuat 'ultrasound scan' pada 16/6/1994 menunjukkan 'retain product of conception (RPOC)' dan telah pada 17/6/1994 melakukan prosedur 'curreted out' namun Plaintif masih mengalami pendarahan yang berterusan. Pada 17/6/1994 juga Hospital Pulau Pinang telah melakukan 'emergency total abdominal hysterectomy'. Akibat daripada pembedahan ini mengakibatkan Plaintif tidak boleh mengandung lagi. ...
>
> ... Jelaslah daripada keterangan di atas Plaintif telah mengalami pendarahan sehari selepas kelahiran (secondary post-patum haemorrhage). Menurut keterangan Dr. Suresh (SP8) dari Hospital Pulau Pinang symptom yang di alami oleh Plaintif adalah selari dengan secondary post-patum haemorrhage kerana Plaintif telah mengalami pendarahan selepas melahirkan anak, penurunan tahap hemoglobin kepada 6.4g%, tanda-tanda infection disebabkan oleh demam adalah kebiasaannya adalah disebabkan oleh 'retained placenta'. Keterangan Dr. Suresh disokong atau konsisten dengan keterangan Dr. A. Paraviappan (SD5) yang mengatakan bahawa tiga faktor menyebabkan secondary post mortem haemorrhage iaitu:
>
> (1) Sub-involution of the uterus
>
> (2) Retained products
>
> (3) Infection of the uterus

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Oleh kerana tiada bukti bahawa Plaintif telah mengalami sub-involution of the uterus, maka pendarahan Plaintif adalah disebabkan retained products atau infection of the uterus. Menurut keterangan pakar dan doktor dalam kes ini infection of the uterus boleh disebabkan oleh retained placenta.

Plaintif telah membuktikan bahawa tisu yang dikeluarkan melalui D&C daripada Plaintif di Hospital Pulau Pinang adalah placenta. Dr. Najeeme (SP9) telah melakukan ultrasound ke atas Plaintif menunjukkan 'echogenicity within the uterus cavity' yang menunjukkan 'retained product of conception' (POC) iaitu placenta yang beliau sendiri nampak dalam scan. Keterangan SP9 disokong dan konsisten dengan keterangan Dr. Balanathan (SP10) yang telah melakukan D&C untuk keluarkan POC tersebut. SP9 (sic) telah mengatakan beliau kenalpasti dengan melihat secara visual tisu itu adalah placenta, yang dikeluarkan agak 'substantial' beliau tidak hantar tisu untuk dianalisa oleh histology kerana pada masa itu tidak menjadi amalan Hospital itu pada ketika itu. Walaupun keputusan ahli patologi Dr. Halimah (SP4) yang memeriksa spesimen uterus untuk pengesahan sama ada tisu placenta 'adherent to the uterus' adalah berlainan dengan finding oleh Dr. Suresh bahawa tisu yang dikeluarkan adalah placenta tidak menyangkal keterangan lain terutama Dr. Balanathan (SP10) yang telah lihat secara visual dan mengesahkan keluarkan secara substantial dan sahkan ianya adalah tisu placenta ...

... *Peguam Defendan bukan sahaja menafikan kecuaian Defendan pertama malahan telah mendakwa bahawa Plaintif telah mengalami pendarahan, menjalani D&C dan kemudian 'hysterectomy' adalah kecuaian doktor Hospital Pulau Pinang* di dalam memberi ubat antibiotic, melakukan D&C yang telah menyebabkan pendarahan berterusan yang mengakibatkan uterus Plaintif terpaksa dibuang. Berdasarkan keterangan Plaintif, nota perubatan daripada Hospital Butterworth (P6), rekod perubatan dari Hospital Pulau Pinang (P7) dan laporan pakar (P8) daripada Dr. Suresh SP8 dari Hospital Pulau Pinang telah menunjukkan Plaintif telah mengalami pendarahan sehari selepas discaj daripada klinik Defendan. Keterangan daripada saksi Plaintif-plaintif, suami plaintif SP2, SP3, SP8, SP9 dan SP10 telah menyokong laporan perubatan Plaintif yang dikemukakan dan telah menyangkal semua dakwaan Peguam Defendan.

Perlaksanaan D&C ke atas Plaintif dilakukan di Hospital Pulau Pinang oleh Dr. Balanathan (SP10) adalah mengikut peraturan dan tidak membuktikan kecuaian di pihak Hospital Pulau Pinang seperti didakwa oleh Peguam Defendan. Sebelum D&C dilakukan untuk mengeluarkan ketinggalan produk kehamilan (POC) Dr Najeeme (SP9) telah melakukan scan ke atas Plaintif dapati ultrasound menunjukkan 'echogenicity within the uterus cavity' dan 'findings: retained POC'. Perkara ini disahkan oleh SP9 di Mahkamah. Di dalam keterangannya beliau pasti telah buat scan sahkan findings bahawa terdapat 'retained POC'. Walaupun Peguam Defendan cuba menyangkal finding dan scan yang dilakukan oleh SP9 namun tiada keterangan daripada saksi pakar Defendan atau apa dokumen membuktikan SP9 tidak membuat scan menurut peraturan atau tidak layak untuk kendalikan scan serta findings tidak boleh diterima sebagai keterangan SD5 hanya mengatakan 'reliability of the scan depends on the seniority and experience of the person' bukan menyebabkan findings akan berubah atau ditolak.

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Pihak Plaintif telah membuktikan bahawa D&C oleh Dr. Balanathan (SP10) di Hospital Pulau Pinang adalah menurut peraturan dan amalan yang diamalkan pada masa itu. Menurut SP10 beliau hanya melakukan D &C selepas mengesahkan scan yang dilakukan oleh SP9 menunjukkan terdapat 'retained POC'. Beliau telah memberi keterangan bahawa beliau telah keluarkan tisu placenta yang agak 'substantial' yang dapat dilihat secara visual, beliau tidak hantar tisu yang dikeluarkan untuk analisa kerana pada masa itu tidak menjadi amalan oleh pihak Hospital.

Menurut keterangan saksi Plaintif terutama SP8 'hysterectomy' telah dilakukan selepas D&C dilakukan kerana Plaintif masih mengalami pendarahan yang berterusan. 'Hysterectomy' — pembedahan untuk mengeluarkan uterus Plaintif. Peguam Defendan cuba mendakwa bahawa D&C yang menyebabkan pendarahan uterus cavity namun tidak dipersetujui oleh SP8 yang mengatakan 'infection trigged off the bleeding. In this sort of situation, the bleeding can occur suddenly.' Keterangan SP8 disokong oleh keterangan saksi pakar Defendan (SD5) bahawa semasa soalan utama 'What was the cause of the massive bleeding in Penang Hospital dan jawapannya due to infection.' *Peguam Defendan hanya berhujah bahawa pembedahan hysterectomy adalah akibat daripada kecuaian pihak Hospital Pulau Pinang kerana telah melakukan D&C sebelum membuat scan ultrasound, sebelum minggu jangkitan telah dikawal dengan sempurna serta sebelum rawatan antibiotik disempurnakan, namun tidak ada keterangan saksi pakar Defendan yang mengesahkan kecuaian ini telah dilakukan oleh pihak Hospital Pulau Pinang.*

Hujahan Peguam Defendan bahawa pembedahan 'hysterectomy' adalah kecuaian doktor di Hospital Pulau Pinang namun tidak dibuktikan melalui keterangan saksi atau dokumen.

... Walaupun Peguam Defendan mendakwa kecuaian tersebut bukan oleh Defendan kedua tetapi oleh doktor dari Hospital Pulau Pinang, namun sehingga kes diputuskan pihak Defendan tidak pernah memasukkan pihak ketiga atau Hospital sebagai Defendan di dalam tindakan ini. Dakwaan Defendan bahawa Hospital Pulau Pinang patut dipersalahkan atau Plaintif telah tersalah saman, namun sampai hari ini pihak Hospital Pulau Pinang tidak disaman untuk menjadi pihak di dalam tindakan ini. Juga tiada permohonan oleh Defendan dalam tindakan ini untuk membatalkan pernyata tuntutan Plaintif terhadap Defendan.

(Emphasis added.)

THE OUTCOME OF THE FIRST SUIT

[27] On 12 December 2010 the sessions court found Dr Aishah to be liable for medical negligence and gave judgment in favour of Zalina in the sum of RM130,000 with interest and cost. Dr Aishah appealed to the High Court. On 22 July 2013, Dr Aishah's appeal to the High Court was dismissed. Dr Aishah did not pursue the matter further and did not apply for leave to appeal to the Court of Appeal bearing in mind that an appeal is the only way of correcting any erroneous finding by a court.

[28] In *Sinarlim Sdn Bhd v Waja Destinasi (M) Sdn Bhd* [2011] 5 MLJ 416;

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[2012] 3 CLJ 678 Ramly Ali JCA held at p 423 (MLJ); p 686 (CLJ) that:

> Even if the decision of the Ipoh High Court in granting the winding up order is wrong, it should have been dealt with by the Court of Appeal (on appeal by the respondent), but not to be set aside or rescinded by another High Court of concurrent jurisdiction.

[29] The present suit was filed on 18 May 2012 ie before the appeal to the High Court was disposed off. Thus by not appealing further, Dr Aishah is deemed to have accepted the correctness of the findings made by the learned sessions court judge. However, Dr Aishah now seeks to have another bite at the proverbial cherry by resurrecting the issue of HPP's alleged negligence by way of the present suit.

THE PRESENT SUIT

[30] In the present suit Dr Aishah has levelled very serious allegations against the defendants and has not only called into question their professional conduct and their competence but also their honesty and integrity. It is alleged, inter alia, that the doctors at HPP had acted dishonestly in that they lied and gave false evidence and are guilty of infamous conduct within the meaning of the Medical Act 1971. In the present suit, Dr Aishah claims an indemnity or contribution from the defendants.

THE DEFENDANTS' BASIS FOR STRIKING OUT

[31] The defendants have applied to strike out the suit under O 18 r 19(1)(a) or (b) or (d) of the ROC . Essentially, the defendants maintain that the present suit is barred by limitation and is in any event an abuse of process in light of their plea of res judicata.

[32] The grounds relied upon were amplified in Dr Suresh's affidavit (encl 12), where he says:

> Saya sesungguhnya menyatakan bahawa melalui Saman Terpinda bertarikh 21.1.2002 dan Pernyataan Tuntutan bertarikh 21.1.2002, pesakit tersebut telah menyaman Plaintif melalui Saman No. 53–177–2000 di Mahkamah Sesyen Sungai Petani (selepas ini dirujuk sebagai 'tindakan yang terdahulu tersebut') untuk kecuaian professional dalam pengendalian proses kelahiran beliau di Klinik Dr. Aishah – Dr. Fisol pada 8.6.1994, khususnya terhadap kecuaian beliau meninggalkan produk-produk kehamilan di dalam rahim beliau selepas kelahiran anaknya. (Sesalinan Saman Terpinda dan Pernyataan Tuntutan tersebut ditunjukkan kepada saya dan dilampirkan di sini sebagai Ekshibit 'SK-1').
>
> Saya selanjutnya sesungguhnya menyatakan bahawa Plaintif telah memfailkan Pembelaan bertarikh 5.3.2003 terhadap tuntutan pesakit tersebut dan menafikan sebarang kecuaian tetapi sebaliknya menyatakan bahawa rahim yang pada akhirnya dibuang oleh Hospital Pulau Pinang tidak mengandungi sebarang tisu-tisu

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placenta, iaitu produk-produk kehamilan. (Sesalinan Pembelaan tersebut ditunjukkan kepada saya dan dilampirkan di sini sebagai Ekshibit 'SK-2')

Saya sesungguhnya menyatakan bahawa saya, bersama-sama dengan Defendan Kedua dan Ketiga dalam tindakan ini telah memberi keterangan untuk pihak pesakit tersebut dalam perbicaraan dalam tindakan yang terdahulu tersebut, khususnya bahawa rawatan yang telah diberikan, iaitu pemberian antibiotic melebihi 24 jam, prosidur Evacuation of Retained Products of Conception (D&C — Dilatation and Curettage) selepas imbasan bunyi dan juga pembedahan Emergency Total Abdominal Hysterectomy, kepada pesakit tersebut adalah mengikuti amalan perubatan semasa.

Saya juga telah dinasihatkan oleh Peguam Persekutuan dan sesungguhnya percaya dan menyatakan bahawa Hakim Mahkamah Sesyen yang bijaksana telah mengambil kira, mempertimbangkan dan menerima sebagai fakta-fakta kes yang terdahulu tersebut, keterangan-keterangan saya dan juga Defendan Kedua dan Defendan Ketiga dalam membuat keputusan tersebut. *Hakim Mahkamah Sesyen juga memutuskan bahawa tiada terdapat sebarang bukti dan/atau keterangan saksi yang mengesahkan kecuaian pihak Hospital Pulau Pinang dan Plaintif tidak pernah mengambil tindakan untuk menjadikan Hospital Pulau Pinang sebagai Pihak Ketiga dalam tindakan tersebut*. (Sesalinan Alasan Penghakiman Mahkamah Sesyen Sungai Petani ditunjukkan kepada saya dan dilampirkan di sini sebagai Ekshibit 'SK-3').

LIMITATION: PUBLIC AUTHORITIES PROTECTION ACT 1948

[33] Although the defendants have raised the issue of limitation as a ground to strike out the suit based on the provisions of the Public Authorities Protection Act 1948, I find that that ground is of no utility in so far as this case is concerned. Whilst it is clearly beyond doubt that there was a firm and final ruling in the first suit that HPP and its doctors were absolved and exonerated of any negligence, Dr Aishah nevertheless maintains that she is entitled to mount the present action against HPP and its doctors as her cause of action against HPP and its doctors is based on a claim of indemnity and/or contribution which only accrued upon the decision of the sessions court being made on 12 December 2010 and not at any time earlier.

[34] The submission that was taken on behalf of Dr Aishah in this regard is predicated on the principle that was enunciated by the Supreme Court in *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 ('Mat Abu's case') where it was held that:

... In our opinion the answer to the appeal before us lies in ascertaining the true object of s 10(1)(c) of our Civil Law Act. Like its English predecessor the provision gives a right to a tortfeasor to recover contribution from any other joint tortfeasor who has caused or contributed to the same damage.

We also do not think that a proceeding under O 16 of the Rules of the High Court 1980 is intended to be treated in the same way as an action between a plaintiff and a defendant.

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> Third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. When a defendant is made liable to the plaintiff, he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. *Time should begin to run from the date the defendant is held liable*.

[35] Next, in response to the complaint by the learned senior federal counsel that Dr Aishah should have taken out third party proceedings or joined HPP and its doctors as co-defendants, counsel maintained that Dr Aishah had a right to file a fresh action for contribution or indemnity based on the observation made by the Court of Appeal in *Dato' Abul Hassan bin Mohamed Rashid v Multi-Code Electronics Industries & Anor* [2012] 5 MLJ 176 at p 180 ('*Dato' Abul Hassan*'s case') where it was held 'The third party proceedings must be viewed as independent proceedings between the second defendant as plaintiff and the six directors as defendants' and at p 182 where it was said:

> And it must also be emphasised that the second defendant is not prevented from filing a fresh action against the proposed third parties on the allegations as alluded to by the second defendant in his third party notices.

[36] Following *Mat Abu*'s case, it would appear that for purposes of limitation vis-a-vis a claim for contribution and/or indemnity against HPP and its doctors as joint tortfeasors, time runs from the date when Dr Aishah was found liable to Zalina. In my view, *Mat Abu*'s case only answers the limitation issue, whereas here the issue is res judicata, which precludes a party from raising the same issue which has already been adjucated upon in previous proceedings in circumstances where to allow such an issue to be raised would constitute an abuse of process.

[37] In this regard, I must say that I am unaware of any legal or equitable restriction or impediment to HPP and its doctors being added as third parties or co-defendants in the first suit, notwithstanding that liability against Dr Aishah had yet to be determined. Indeed, there was no suggestion by counsel for Dr Aishah that they could not join HPP and its doctors as third parties or as co-defendants whilst the first suit was afoot. They simply chose not to do so.

[38] Hence, inspite of the pronouncement made in *Mat Abu*'s case I take the view that in certain circumstances if a party fails to add another party as a third party or co-defendant, then the fact that limitation has not begun to run will not necessarily defeat a plea of res judicata. Indeed, I would go so far as to say that it is not only expedient but may also be imperative that all necessary parties be included either as third parties or as co-defendants at the earliest possible opportunity and most certainly before the start of the trial so that the forensic trial process need not be duplicated later by way of fresh proceedings as is being attempted in this case.

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[39] In the present case, it was obvious enough that if all the relevant parties had been joined at the appropriate time whilst the first suit was afoot, then there would be enormous savings all round in terms of time and resources and the present defendants would not have to face the prospect of another round of litigation, this time with them as parties rather than witnesses. There is also no doubt that the present suit will rake up all the previous evidence and require all the previous witnesses to testify once again.

[40] Also, in my view, *Dato' Abul Hassan*'s case does not denude the plea of res judicata as the independent nature and quality of a suit for indemnity or contribution (whether by way of a fresh suit or otherwise) is no answer to a plea of res judicata.

[41] In the result, whilst I accept the principles enunciated in these cases, I do not see them as authorities capable of emasculating a plea of res judicata. As was rightly observed by the learned sessions judge, Dr Aishah took no steps to join HPP and its doctors as third parties to the first suit, in circumstances where it was or should have been obvious that HPP and its doctors ought to have been added as parties especially since Dr Aishah was making a direct attack on them and as the issue of their alleged negligence was a live issue at the trial in the first suit.

[42] As I stated earlier, it was open to Dr Aishah to have joined HPP and its doctors either as third parties under O 16 or as co-defendants under O 15 of the Rules of the Subordinate Courts 1980. But Dr Aishah chose not to do so. Had she done so and brought HPP and its doctors into the first suit either as third parties or co-defendants, then she would have had every opportunity for seeking further and better particulars, discovery and to administer interrogatories so that all the cards are on the table in the first suit.

MEANING OF RES JUDICATA

[43] As I said earlier, the issue here is not one of limitation and the only ground that is tenable and which ought to be considered is the plea of res judicata. Before venturing further, it is apposite to remind ourselves as to the meaning of res judicata. In this regard, it is useful and necessary to refer to the lucid decision of the Federal Court in the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 at p 197 (MLJ); p 791 (CLJ) where res judicata was defined as follows:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicature. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgement becomes the truth between such parties, or in other words, the parties

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should accept it as the truth; res judicata *pro veritate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*.

[44] Also, in the Federal Court case of *Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor* [2009] 2 MLJ 660 at pp 665–666 res judicata was defined as:

Res judicata is defined in *Black's Law Dictionary*, (7th Ed), as follows:

[literally in Latin 'a thing adjudicated] 1 An issue that has been definitively settled by judicial decision. 2 An affirmative defence barring parties from litigating a second lawful lawsuit on the same claim, or any other claim arising from the same transactions and that could have been — but was not raised in the first suit. The three essential elements are (1) an earlier decision on the issue (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties'.

WHETHER RES JUDICATA APPLIES

[45] We may now examine whether res judicata applies to the fact of the present case. In this regard, it cannot be disputed that the issue of liability of HPP and its doctors for negligence was extant in the first suit and was adjudicated and ruled upon by the sessions judge in favour of HPP and its doctors.

[46] In the first suit, Dr Aishah's chosen strategy was to leave HPP and its doctors out of the loop of the proceedings and to merely cross-examine HPP's doctors who testified on behalf Zalina and make submissions so as to impugn the conduct of the doctors of HPP as being negligent.

[47] After a full trial, the learned sessions judge rejected the allegation of negligence made against HPP and its doctors and held that Zalina had proven that Dr Aishah was negligent. She gave grounds for her decision. Dr Aishah appealed to the High Court and the ruling made by the sessions judge was upheld. There was no further appeal.

[48] It is obvious enough that through the present suit, Dr Aishah is once again revisiting the issue of negligence of HPP and its doctors, who say that the present suit is a manisfestation of abuse of process as they have already been absolved of negligence via the judgment in the first suit.

[49] Counsel for Dr Aishah maintains that the plea of res judicata is not sustainable as HPP and its doctors were merely witnesses and were not parties to the first suit by Zalina and neither were they privies to the suit. It was

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contended for Dr Aishah that the doctrine of res judicata or issue estoppel is only applicable between Dr Aishah and HPP and its doctors if they were all parties to the previous action.

PARTIES OR PRIVIES TO PREVIOUS LITIGATION

[50] In this regard, reference was made to *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 where it was stated that for res judicata or issue estoppel to apply, identity of parties is an essential pre-requisite.

[51] In this regard, Peh Swee Chin FCJ stated at p 200 (MLJ); p 793 (CLJ):

> ... i.e that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties ...

[52] Counsel for Dr Aishah also referred to *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 536 at p 565, *DVS Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar and thirteen other ships; The Sennar* [1985] 2 All ER 104 at p 110 e–g and *Haji Junus v Chik & Anor* [1963] 1 MLJ 303 at p 305 G as authorities in support of this point.

[53] Next, counsel for Dr Aishah relied upon *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54 ('*Gleeson v J Wippell*') where the scope of the doctrine of res judicata was explained. *Gleeson v J Wippell* concerned a case of copyright infringement in respect of a shirt, where one alleged infringer was unsuccessfully sued and a subsequent fresh action was commenced against another infringer. The fresh action was allowed to proceed. In that case, the plaintiff alleged that her designs of the shirt were copied by Wippell and Wippell's infringing design was in turn copied by Denne. Gleeson first sued Denne, where employees of Wippell testified in favour of Denne. The first suit was decided against the plaintiff. The plaintiff then brought a fresh action against Wippell who then applied to strike on the suit on a plea of res judicata.

[54] The court refused to strike out the fresh action against Wippel, holding that:

(a) Wippell could not be said to have taken part in the first action, *despite their employees being called as witnesses*;

(b) for res judicata to apply, it is not sufficient that the plaintiff was the same but the defendants in both actions must also have been the same or the initial defendant and the subsequent defendant were privies in interest;

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(c) *privity of interest* does not merely mean having '*some interest in the outcome of litigation*'; A

(d) 'interest' does not mean having a sense of curiosity or concern;

(e) it is not necessary to establish that one defendant is the alter ego of the other defendant but it must be established that there is a sufficient degree of identification between the two so as to make it just that a decision in which one was a party, was binding on the other; B

(f) any contention that a person is liable to be condemned unheard is plainly open to the gravest of suspicions; C

(g) if Denne had lost the initial suit, Wippell could not be said to be bound by that decision against Denne;

(h) the result in the previous action makes it an uphill task for the plaintiff but her claim cannot be said to be doomed to failure; D

(i) the plaintiff should have the right to discover evidence from Wippell and cross-examine its witnesses;

(j) the decision in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 was in regard to adding all relevant contentions and not in regard to adding all relevant parties; E

(k) *Yat Tung Investments* ought not to be extended to compel the addition of all relevant parties;

(l) sometimes a multiplicity of parties would make litigation too cumbersome, protracted and expensive and extending the doctrine in *Yat Tung Investments* to include the necessity to add all relevant parties will put litigants into a position of some peril, requiring them to judge correctly whether or not the case is one in which a court would nor would not add parties; F G

(m) it is just to refuse to permit a plaintiff who has failed to take an obvious point against the defendant to have a second bite of the cherry but it is not similarly just to refuse the plaintiff a chance to sue a party when he had not joined him as a defendant in earlier proceedings against some other party; H

(n) the failure to add a party to the previous proceedings would merely provide material for cross-examination in the second proceedings and it may also sound in costs, especially if the second proceedings have the same result as the first, but the drastic step of striking out proceedings is quite another matter; and I

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(o) the court was apprehensive about a permissive provision in the rules of court regarding the addition of parties to be forged into a weapon which requires some parties to resort to it and correctly judge the effect of the rule at their peril.

[55] According to counsel for Dr Aishah, *Gleeson v J Wippell* has been referred to or followed in the following local decisions:

(a) *Teguh Consolidated Sdn Bhd v Talam Corp Bhd (Malayan Banking Bhd, third party)* [1996] 5 MLJ 664 where the High Court referred to it for the proposition that res judicata only applies where there is identity of parties or their privies; and

(b) *Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor* [1999] 1 MLJ 193, where the Federal Court, in allowing the fresh action to succeed, referred extensively to *Gleeson v J Wippell* and held that 'whether there is sufficient connection to constitute privity of interest would depend on an examination of the factual identity of interests of the parties and the fairness of binding them by a decision in which they were not represented'.

[56] In amplication of this point, counsel for Dr Aishah also submitted that privies are defined as privies in blood; privies in law; and privies in estate. It was submitted that that is not the case here and that the Government of Malaysia was not a privy to a party in the first suit and that if it was, then the honourable attorney general would have taken over conduct of the case for such party. The following cases were cited in aid of that submission: *Reebok International Ltd v Royal Corporation* [1989] 1 MLJ 209 at p 213 and *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 536 at p 565.

[57] According to counsel, Dr Aishah never elected to seek a contribution or indemnity from the HPP and its doctors in the first suit and that her option to commence fresh proceedings against them subsisted at all times.

[58] It was submitted that HPP and its doctors were not parties to the earlier litigation and neither were they privies of Zalina nor of Dr Aishah. They appeared in the previous proceedings merely as witnesses. There was therefore no issue estoppel between them and Dr Aishah. It was submitted that they were not at risk of liability being found against them in the previous case.

[59] For my part, I do not comprehend the suggestion that HPP and its doctors were not at risk of liability being found against them. In my view, in as much as the learned sessions judge had absolved HPP and its doctors of negligence and liability for the diagnosis of retained placenta and the hysterectomy that was carried out, she could well have made the very opposite

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finding and found them liable, in which case Zalina's suit would have been dismissed as liability for negligence against Dr Aishah would not have been made out.

[60] Of course since HPP and its doctors were not parties to the first suit, a finding of negligence against HPP and its doctors would have been of precious little use to Zalina as she would not have been able to enforce it against the Government of Malaysia which would have been vicariously liable for the negligence of HPP and its doctors.

[61] But the point remains that a specific finding of no negligence was made in favour of HPP and its doctors.The question is not one of risk of liability being made against HPP and its doctors but the possibility of of a finding of negligence being made against them. That possibility was always there, except that in the first suit, that possibility dissipated or evaporated as the learned sessions judge made a finding of fact that Dr Aishah was negligent and that HPP and its doctors were not.

WHETHER RES JUDICATA APPLIES WHERE THE PARTIES ARE NOT THE SAME OR WHERE THERE IS NO PRIVITY OF INTEREST

[62] I accept that there is jurisprudence which supports the proposition that there must be privity of interest in order for a party to raise a plea of res judicata. On the other hand, senior federal counsel has correctly pointed out that there is a line of cases which have accepted that the plea of res judicata is also available in situations where the parties are not the same.

[63] In this regard reference was made to Drake J's judgment in *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547 where he opined that issue estoppel applied even where there is no identity of parties. This is what was said in that case:

> Where an issue had for all practical purposes been decided in a court of competent jurisdiction *the court would not allow that issue to be raised in separate proceedings between different parties arising out of identical facts and dependent on the same evidence, since not only was the party seeking to relitigate the issue prevented from doing so by issue estoppel but it would also be an abuse of process to allow the issue to be relitigated*. It followed that since the issue of negligence had already been determined against the consultant engineers in the first action they were estopped from denying negligence and further it would be an abuse of process if they were to be permitted to deny negligence. Their defence denying negligence would accordingly be struck out' ...

[64] Counsel for Dr Aishah describes this as an incautious statement from the English High Court. On the other hand senior federal counsel submitted

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that the said passage was applied by Abdul Malek J in *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713 at p 724. He also referred to other local cases which have adopted the jurisprudence which is suggestive of an extension of the doctrine of res judicata in the sense that for res judicata to apply, parties need not be the same.

[65] In *Jak Kwang Builders & Developers Sdn Bhd v Ng Chee Keong & Ors* [2001] 4 MLJ 391 at p 400 the High Court held:

> Even though the first and second defendants are not parties in the first suit, the crux of the matter in the second suit, where the intention of the plaintiff is to stop the arbitration from proceeding, effectively amounts to a substantial duplication of issues and reliefs sought in the first suit. *For res judicata to apply, parties need not be the same* (see *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713).

[66] In *Nanang International Sdn Bhd v The China Press Bhd* [1999] 2 MLJ 681 at pp 686–687 the High Court held:

> The doctrine of issue estoppel has been given a wider construction and extended to preclude a party to a proceeding from re-litigating in a second proceeding identical issues of fact, law or mixed fact or law which have been determined against him in the earlier proceeding *irrespective of whether the second proceeding involves different parties*.

[67] Then in *Adenan bin Ismail v Naluri Corporation Bhd & Ors* [2010] MLJU 494 the High Court held that:

> Learned counsel for the plaintiff submitted that this court must satisfy that the parties in the Tajudin's Suit and this instant case are the same parties. Even if the plaintiffs in the instant case and in the Tajudin's Suit are not the same parties, Abdul Malek Ahmad J (as the late President of the Court of Appeal) held in *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713 that *for res judicata to apply, the parties need not be the same*.

[68] Notwithstanding the above line of cases, counsel for Dr Aishah submitted that this court should follow the jurisprudence enunciated by the then Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 and reject the plea of res judicata which was made by the present defendants.

[69] But I do note that counsel for Dr Aishah has very properly stated that it is not his position that the law on res judicata and issue estoppel is cast in stone and is not subject to further development. However, he submits that such development must be approached cautiously with due regard to stare decisis.

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EXTENSION OF RES JUDICATA

[70] For my part, I do not see the line of Malaysian High Court cases referred to above and which have followed the jurisprudence which is to be culled form Drake J's judgment in *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547 as being in conflict with *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189. Rather I see them as a necessary extension to the general rule pertaining to the prerequisite for a plea of res judicata. It appears therefore that Drake J's judgment has been gradually assimilated into Malaysian jurisprudence on res judicata and the position now is that merely because parties are not the same or that there is no privity, does not necessarily or automatically bar a plea of res judicata.

[71] In my view, certain compelling circumstances may warrant a departure from the requirement for privity of interest where to insist on it may be unfair or oppressive or may even constitute an abuse of process. The present case is a vivid example of a compelling case for res judicata to apply in favour of HPP and its doctors notwithstanding that they were not parties in the first suit but rather were only witnesses. The significant feature of the first suit is that HPP and its doctors were in pith and substance on trial (If I may put it that way) vis-a-vis the issue of their (alleged) negligence in the diagnosis, treatment and management of Zalina. Since that issue has been found in favour of HPP and its doctors, I am of the view that it may not be resurrected by way of the present suit as that issue is now barred by issue estoppel.

EFFECT OF FAILURE TO JOIN HPP AND ITS DOCTORS AS THIRD PARTIES OR CO-DEFENDANTS

[72] So taking the present set of circumstances, where HPP and its doctors had participated at the trial of the first suit and had been challenged as to their competence and handling of Zalina and having had a ruling made in their favour that they had not been negligent (which was upheld on appeal) and where it was open to Dr Aishah to have them joined as parties to the first suit but chose not to, it cannot be said that merely because they were not parties to the first suit they should be denied the right to raise a plea of res judicata.

[73] Dr Aishah however maintains that the present action against HPP and the doctors is not an abuse of process. Counsel relied upon the following reasons in aid of that submission:

(a) s 10(1) of the Civil Law Act 1956 allows for four different methods of bringing a claim for contribution, as authoritatively confirmed by the Supreme Court in *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165;

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(b) this statutory cause of action subsisting between Dr Aishah and the defendants did not arise until judgment was given in favour of Zalina against Dr Aishah;

(c) it is manifestly unfair to expect Dr Aishah to have commenced expensive proceedings against the defendants when her cause of action against them subsisted but had not arisen;

(d) Dr Aishah would have an opportunity for discovery and cross-examination against the defendants in this action;

(e) of critical importance are the allegations made by Dr Aishah against the defendants, ie that they had committed perjury and fraud in the first suit between Zalina and Dr Aishah;

(f) the administration of justice would be brought into disrepute if such serious allegations of fraud and perjury are not allowed to be ventilated on the argument that this court should be more concerned with consistency in its decisions rather than truth and justice; and

(g) Dr Aishah cannot be held to have abused the process of this honourable court by not adding the defendants as parties to the first suit when the law allowed her four different methods of pursuing her statutory cause of action, one of which is to defend the action by Zalina to conclusion before deciding whether to commence proceedings against the defendants.

ABUSE OF PROCESS: INJUSTICE TO HPP AND ITS DOCTORS

[74] However, in my view, the exhortation by Dr Aishah that the present suit is not a manifestation of abuse must be seen in the light of the judgment reached by the learned sessions judge who at the end of the trial, made a finding of fact that:

(a) there were retained products of conception in the patient's womb;

(b) the evidence of ultrasound were accepted;

(c) the procedure of dilatation and curettage (D&C) had been conducted according to appropriate medical standards;

(d) the antibiotic were given early and according to appropriate medical standards;

(e) the reduced percentage of haemoglobin was due to the retained placenta;

(f) there was no negligence on the part of HPP in conducting the hysterectomy; and

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(g) the non-existence of 'residual potential tissue' in the histopathology report was due to the fact that 'the placenta tissue had been completely curetted' (removed by scrapping).

[75] It is trite that in certain circumstances, a plea of res judicata would not be allowed as to do so may result in an injustice to the party facing a plea of res judicata. At the same time, it is also necessary to consider whether any injustice may be occasioned if a plea of res judicata is not allowed. In the present case, the injustice is not Dr Aishah but rather to HPP and its doctors, who after a lapse of 16 years from the time when the hysterectomy was conducted and several years after participating at the trial in the first suit are faced with a fresh suit where essentially the same issue is being relitigated coupled with a variety of other allegations made in order to challenge their competence and integrity.

[76] As a matter of fairness, fairplay and justice, since Dr Aishah had shifted the blame to HPP and its doctors in the first suit, she should have joined HPP and its doctors either as third parties or co-defendants in the first suit and thereafter made all necessary interlocutory applications by way of further and better partculars or discovery or interrogatories. In the result, I am impelled to the view that everything that is being articulated against HPP and its doctors in the present suit could have been done in the first suit.

[77] In my view, in the circumstances of the situation which prevailed in the first suit and in particular having regard to Dr Aishah's trial strategy of shifting the blame to HPP and its doctors, it was incumbent upon Dr Aishah to ensure that HPP and its doctors were added as third parties or co-defendants in the first suit. Also, since they had participated as witnesses and had their competence challenged and a finding had been made by the sessions court that they were not liable for any negligence (which had been upheld by the High Court), there must be finality to litigation. As such, it would be unjust and oppressive in the extreme to allow Dr Aishah to drag HPP and its doctors through another round of litigation and for the issue to be relitigated.

THE OUTCOME

[78] In the circumstances, and for the reasons as stated above, I am impelled to the view that notwithstanding that HPP and its doctors were neither parties nor privies to the first suit, the facts and circumstances of this case are such that they had participated in the first suit and a ruling on the issue of liability had been made in their favour and as such, a fresh suit against them based on essentially the same issue constitutes an abuse of process and the plea of res judicata (issue estoppel) therefore succeeds. The defendants' application by way of encl 12 must therefore be allowed.

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A THE ORDER

[79] I therefore granted an order in terms of encl 12. The writ and statement of claim is struck out and dismissed. The plaintiff is ordered to pay costs in the sum of RM7,000 to the defendants.

B

Application allowed, writ and statement of claim struck out.

Reported by Ashok Kumar

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